-260

FILED

AUG 16 1972

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-260

KENT MEYER, a Resident Taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself and all other similarly situated taxpayers,

Petitioner,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, MAYOR JAMES H. NORICK and CITY MANAGER ROBERT H. OLDLAND,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

JACK P. TREZISE
6323 East Reno Avenue
Midwest City, Oklahoma 73110
Counsel for Petitioner

August, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. .....

KENT MEYER, a Resident Taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself and all other similarly situated taxpayers,
Petitioner,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, MAYOR JAMES H. NORICK and CITY MANAGER ROBERT H. OLDLAND,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INTRODUCTION

KENT MEYER, a resident taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself, and all similarly situated taxpayers, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma, entered in the above entitled case on May 16, 1972.

OPINIONS BELOW

The opinion of the Oklahoma State Supreme Court, issued in Case No. 43955, dated March 28, 1972, not yet reported, denying petitioner affirmative relief, and the further Order of the Oklahoma State Supreme Court, issued in Case No. 43955, dated May 16, 1972, denying a rehearing are hereto attached and marked Appendix A and Appendix B.

The Memorandum Opinion of the United States District Court for Utah, Central Division, Case No. C-10-71, *Alma F. Anderson, Diana Barclay, Betty Jean B. Nielsen and Parker M. Nielson, Plaintiffs* v. *Salt Lake City Corporation and Salt Lake County, Utah, Defendants,* dated February 3, 1972 (not yet reported), is hereto attached and marked Appendix C.

The Judgment and Decree of the United States District Court for Utah, Central Division, Case No. C-10-71, dated February 3, 1972 (not yet reported), is hereto attached and marked Appendix D.

JURISDICTION

The Judgment of the Supreme Court of the State of Oklahoma was made and entered on March 28, 1972; Petitioner's Petition for Rehearing was denied May 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATE CONSTITUTIONAL PROVISIONS INVOLVED

Article II, Bill of Rights of the Oklahoma Constitution Section 5:

"No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

QUESTION PRESENTED

Is the permanent erection in 1955, and continuous display since then, of a 50-foot tall, monumental, illuminated, concrete Christian Cross by the "Oklahoma City Council of Churches," on the Oklahoma City Fairgrounds, which were acquired by a Four Million Seven Hundred and Fifty Thousand Dollar Bond Issue in 1950, for the purchase of a fairgrounds to be owned exclusively by the City, and further authorizing the City to levy and collect an annual tax in addition to all other taxes upon all taxable property to retire the bonds for a period of twenty-five years, or until 1975, and the continuous maintenance of the cross, illumination, landscaping and care of the ground on which it stands, by Oklahoma City and their employees, a violation of Article II, Section 5, of the Oklahoma Constitution?

STATEMENT

Oklahoma City in 1950 submitted a proposal to the qualified electors, which passed, a Four Million Seven Hundred and Fifty Thousand Dollar Bond Issue, for the purchase of a fairgrounds to be owned exclusively by the City, and further authorizing the City to levy and collect an annual tax in addition to all other taxes upon all taxable property to retire the bonds, for a period of twenty-five years, or until 1957.

Five years later a group known as the "Oklahoma City Council of Churches, an Oklahoma Corporation," was instrumental in the planning, construction and placing of the cross herein complained of upon the fairgrounds, where it has stood for the past seventeen years, as the eternal symbol of the group that placed it there, even surviving the group itself, which has recently been dissolved.

On July 3, 1969, Petitioner filed an application for injunction in the District Court of Oklahoma County, State of Oklahoma, and the matter was heard on November 26, 1969, at which time he received an unfavorable ruling. The decision of the District Court of Oklahoma County was appealed to the Oklahoma State Supreme Court on the 5th day of December, 1969, and on May 16, 1972, that court entered its final Order therein.

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The right to a hearing is inherent under the Constitutions of Oklahoma and the United States.

This was a case of first impression for the District Court of Oklahoma County, State of Oklahoma.

This was a case of first impression for the Supreme Court of the State of Oklahoma.

This is (since only Article II, Section V, of the Oklahoma Constitution is pleaded) a case of first impression herein.

Petitioner herein is concerned with but two (2) other cases in the United States, as follows, to-wit: *Lowe* v. *The City of Eugene, Oregon,* 459 P.2d 222 (Ore. 1969), *appeal dismissed* 25 L.Ed.2d 596, *certiorari denied* 25 L.Ed.2d 654, and *Alma F. Anderson, et al.* v. *Salt Lake City Corporation, et al.*, No. C-10-71 (not yet reported, but included as Appendix B, and Appendix C, herein).

Somewhat before, and during the time the instant case has been pending, the following things have happened:

A. The trial court in Eugene, Oregon, ordered that cross removed.

B. The Oregon Supreme Court reversed the trial court.

C. Upon rehearing, the Supreme Court of Oregon reversed themselves, adopted a former dissenting opinion, and ordered that cross removed.

D. The Supreme Court of the United States denied certiorari, as it was apparently content with the last decision of the Oregon Supreme Court wherein they ordered that cross removed.

E. While the Oregon case was before the Supreme Court of the United States, or shortly thereafter, an initiative petition was circulated in Eugene, Oregon, seeking to call an election to authorize the city to accept the cross as a gift, and further, to make it to be, and declare it to be, and call it a War Memorial; and the Oregon cross still stands, subject to further interpretation of the courts.

More recently, the United States District Court for Utah, Central Division, Case No. C-10-71 (not yet reported), in their opinion and Order dated February 3, 1972, attached hereto as Appendix C and Appendix D, ordered various monolith monuments with the Ten Commandments inscribed thereon, removed from public grounds. This case reportedly is presently on appeal to the United States Court of Appeals for the Tenth Circuit, at Denver, Colorado, and remains to be resolved by that Court.

True, there are a multitude of cases involving Church/State questions, but the Oklahoma State Supreme Court has previously ruled in *Antone* v. *Independent School District, No. 52*, 384 P.2d 913 (Okla. 1962), as follows:

> "As we pointed out in Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002, if the cost of school buses and the maintenance and operation thereof is in aid of the public schools, then it would necessarily follow that when pupils of parochial schools are transported by them, such service is in aid of that school. *ANY* [em-

phasis ours] such aid or benefit, either directly, or indirectly, is expressly prohibited by the above quoted provision of the Constitution of Oklahoma. It must be upheld and enforced by all Courts."

The Oklahoma State Supreme Court's opinion in the *Antone* case was later upheld by the Supreme Court of the State of Hawaii, in *Spears, et al.* v. *Honda, et al.*, 449 P.2d 130 (Hawaii 1968).

The "Oklahoma City Cross" is simply in the wrong place! It belongs on either privately-owned, or church-owned property. It does not belong on public property purchased with tax revenues in violation of Article II, Section V, of the Oklahoma Constitution.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the State of Oklahoma.

Respectfully submitted,

JACK P. TREZISE
6323 East Reno Avenue
Midwest City, Oklahoma 73110
Counsel for Petitioner

August, 1972

CERTIFICATE OF SERVICE

Three true and correct copies of the above and foregoing Petition were this _____ day of August, 1972, mailed with postage prepaid thereon, to:

Mr. Roy Semtner,
Municipal Counselor of Oklahoma City,
200 N. Walker
Oklahoma City, Oklahoma,

and;

Mr. Warren Cameron, Amicus Curiae,
for Affirmance,
806 Capitol Center Bldg.,
Olympia, Washington, and;
145 Wilson Street, South
Salem, Oregon, and;
825 East Park, Eugene, Oregon.

JACK P. TREZISE

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
OF OKLAHOMA
MAR 28 1972
ANDY PAYNE
Clerk

Kent Meyer, a Resident Taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself and all other similarly situated taxpayers	)	
Plaintiff in Error	)	
vs	)	No. 43955
The City of Oklahoma City, a municipal corporation, Mayor James H. Norick and City Manager Robert H. Oldland	)	
Defendants in Error	)	

SYLLABUS

To withstand a the challenge of a general demurrer, a petition seeking injunctive relief, which alleges a violation of Art. 2, §5, of the Constitution of Oklahoma, must allege facts that reveal that public money or property are appropriated, applied or donated for the use, benefit or support, in some effective way, of any sect, church, denomination, system of religion or sectarian institution as such.

[APPENDIX]

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Hon. William S. Myers, Jr., Judge

Action by a resident taxpayer of Oklahoma City on his own behalf, and on behalf of all other similarly situated taxpayers, to enjoin Oklahoma City, its Mayor and City Manager from maintaining, landscaping and illuminating a prestressed 50 feet tall Latin Cross on land owned and controlled by Oklahoma City, The Fair Grounds. A general demurrer was sustained by the trial court. Plaintiff appeals.

AFFIRMED

Jack P. Trezise
Midwest City, Oklahoma — For Plaintiff in Error

Roy H. Semtner
Municipal Counselor

Irving L. Faught
Assistant Municipal Counselor
Oklahoma City, Oklahoma — For Defendants in Error

Warren Cameron
Seattle, Washington — For Amicus Curiae

DAVISON, V.C.J.

This is an appeal from a judgment of the District Court of Oklahoma County, Oklahoma, sustaining defendants' general demurrer to plaintiff's petition and dismissing plaintiff's petition. Plaintiff, a resident taxpayer of Oklahoma City, Oklahoma, on his own behalf and on behalf of other similarly situated taxpayers instituted this action against the City of Oklahoma City, a municipal corporation, its Mayor James H. Norick and City Manager Robert H. Oldland, defendants, to perpetually enjoin and restrain

said defendants from maintaining upon a triangular lot (129 feet v 126 feet x 177 feet) located at the Fair Grounds on Oklahoma City land and facing Stagecoach Street, General Pershing Boulevard and Land Rush Street, a religious symbol alleged to be representative of the Christian Faith, in the form of a 50 foot high, Latin Cross designed to stand forever and which defendants allowed the Oklahoma City Council of Churches to install. Plaintiff alleges additionally that at Oklahoma City expense, the lot on which The Cross stands has been landscaped with flowers, shrubs and a lawn; The Cross has six electrical outlets, Oklahoma City pays the electricity for the use of the triangular lot; that The Cross was designed by a Presbyterian architect at the request of an employee of Oklahoma City who was then Secretary of the Oklahoma City Council of Churches and two Presbyterian pastors; that although said cross has been designed to "stand forever, it has been somewhat abandoned, is presently in a state of disrepair, and as such as an egregious insult to many Christians and followers of other faiths."

Plaintiff further alleges that all the above was done at the instigation of and by the Oklahoma City Council of Churches and by defendants in violation of Article 2, §5 of the Oklahoma Constitution which says:

> "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefits, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

We should emphasize here that plaintiff alleges a violation only of the indicated part of the Oklahoma Constitution and does not allege a violation of the Fourteenth Amendment to the Constitution of the United States embracing as it does the mandate of the First Amendment

that "Congress [a state] shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." While without doubt certain violations of Art. 2, §5 of the Oklahoma Constitution may be also violations of the First Amendment implications in the Fourteenth Amendment to the Constitution of the United States, we shall concern ourselves only with the meaning and application of Art. 2, §5.

At the threshold of our consideration of whether plaintiff's petition states grounds for injunctive relief under Art. 2, §5, of the Oklahoma Constitution, we must take note of two cases each involving an effort to enjoin the maintenance and display of a cross upon public property. Lowe v. City of Eugene, Or., 459 P.2d 222 (former opinion 451 P. 117) and Paul v. Dade County, Fla., 202 So.2d 834. In the latter case decided in 1967 by the District Court of Appeals of Florida (Third District) the plaintiff, a non-christian, instituted action to enjoin Dade County from maintaining a lighted cross, a religious symbol, on the Dade County Court House during the month of December, 1966. The evidence reflected that this cross with other lights and decorations was originally placed on the court house at the request of members of the Miami Chamber of Commerce and that this was done in order to help decorate the streets of Miami and attract holiday shoppers to the down town area. There was a finding that the money for the maintenance and removal of the lights for the cross was donated by private persons and no public funds would be used in connection therewith. Notwithstanding this finding appellant argued that his [constitutional] rights were violated by maintaining a religious symbol on a public building which his taxes helped support. Since no money was taken from the public treasury Art. 1, §6, of the Florida Constitution of 1885 did not come into play. The court held there was no violation of plaintiff's "First Amendment Rights." Both the Supreme Court of Florida and the Supreme Court of the United States denied certiorari. 207 So.2d 690, 300 U.S. 1041.

In Lowe, the Oregon case, the trial court, in a suit for declaratory relief ordered the City of Eugene to remove from a public hill top park a neon-lighted concrete cross some 50 feet tall, which when lighted was visible for several miles over a major part of the City of Eugene. The cross was erected and maintained by the Eugene Chamber of Commerce without a permit at no expense to the City of Eugene. Later a permit was acquired. The fact that public expense was not involved precluded the application of Art. 1, §5, of the Oregon Constitution. In fact no reference was made thereto by the Oregon Supreme Court. The Oregon Supreme Court first reversed then withdrew its first opinion and affirmed the judgment of the trial court presumptively on "First Amendment" grounds. The Oregon Constitution was not mentioned but the United States Supreme Court denied certiorari, nevertheless, because the judgment below rested on adequate state grounds.

The Florida and Oregon cases, reaching opposite result, although possessing factual similarities to the case before us, did not call into play, state constitutional provisions which like ours were designed to prevent sectarian bodies from making raids upon the public treasury or from subjecting public property to unauthorized sectarian uses.

Accordingly, we must decide upon the basis of our own prior decisions whether the maintenance of the cross, pictured as exhibit A to plaintiff's petition, upon public property, at slight but continuing public expense, constitutes a violation of Art. 2, §5, of the Oklahoma Constitution.

In Connell v. Gray, 33 Okl. 591, 127 P. 417, we held that under Art. 2, §5, which is self executing, the State of Oklahoma could not appropriate money for the support of the Young Men's and Young Women's Christian Association each of whom promulgated a system of religion and it follows that the Board of Regents of the Agricultural and Mechanical Colleges cannot be granted the power to

levy a fee on every prospective student, as a condition precedent to entrance, to be used for the maintenance of the Young Men's and Young Women's Christian Association. In Oklahoma Ry. Co. v. St. Joseph's Parochial, et al, 33 Okl. 755, 127 P. 1087, we held that Art. 2, §5, did not prohibit the condition of a franchise to Oklahoma Ry Co., requiring the Ry. Co. to issue reduced fare tickets to public school children, from applying to children attending parochial schools. We there said: "To say that the State is hostile to all schools except the public schools of the State or those carried on in state institutions is not borne out by the record." The grant of half fares was a grant to school children for a public purpose. We there pointed out in this connection: "It is beyond the power of the legislative agencies of this state under our constitution to require a parent to send his child to the public schools if he affords him reasonable educational facilities at a sectarian, denominational or private school."

In Gurney et al v. Ferguson, 190 Okl. 254, 122 P. 1002, we held that a legislative enactment (Art. 11, ch. 34, S.L. 1939), requiring the use of public property or the expenditure of public funds in transporting pupils of a sectarian school to and from such school, violates Art. 2, §5. Board of Education for Ind. Sch. Dist., No. 52 v. Antone, Okl., 384 P.2d 911, involved the same question and the same provision of the Oklahoma Constitution with the same result as in Gurney v. Ferguson, supra.

In Murrow Indian Orphans Home v. Childers, State Auditor, 197 Okl. 249, 171 P.2d 600, we held that House Bill 519, 1945 S.L., p. 137, did not violate Art. 2, §5. This legislative enactment authorized the Board of Affairs to make payment under contract to sectarian orphans' homes or institutions, which are not state owned, to defray the expense of maintenance and supervision of Oklahoma destitute and delinquent minor children who are in such homes or institutions. In distinguishing Gurney v. Ferguson we

said that in Gurney public money was being spent to furnish a service to a parochial school for which no corresponding value was received. In referring to the religious aspect of the constitutional question we said: "It is not the exposure to religious influence that is to be avoided; it is the adoption of sectarian principles or the monetary support for one or several or all sects that the state must not do." In State v. Williamson, Okl., 347 P.2d 204, we held that the construction upon state-owned orphans home of a memorial chapel as a gift to the orphans home made by the trustee of a private trust was not a violation of Art. 2, §5, even though maintained and operated by the orphan home, in view of the chapel's use for assembly purposes, where religious worship is not required, and when conducted is non-sectarian and non-denominational.

Our prior decisions make it clear that whenever public money or property become operative in an effective way to be appropriated, applied, donated or used for the use, benefit or support of any sect, church, denomination, system of religion or sectarian institution as such, the proscribed practices have been enjoined. But here the maintenance of this cross, as delineated and pictured in plaintiff's petition, cannot conceivably be said to operate for the use, benefit or support of any of the institutions or systems named in Art. 2, §5. The cross is in a distinctly secular environment in the midst of persons in pursuit of distinctly secular entertainment. Notwithstanding the alleged sectarian conceptions of the individuals who sponsored the installation of this cross, it cannot be said to display, articulate or portray, except in a most evanescent form, any ideas that are alleged to pertain to any of the sectarian institutions or systems named in Art. 2, §5. The alleged commercial setting in which the cross now stands and the commercial atmosphere that obscures whatever suggestions may emanate from its silent form, stultify its symbolism and vitiate any use, benefit or support for any sect, church, denomination, system of religion or sectarian institution as such. On the

basis of the foregoing we hold that plaintiff's petition did not state grounds for injunctive relief.

Affirmed.

ALL JUSTICES CONCUR.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, May 16, 1972

FILED
SUPREME COURT
OF OKLAHOMA
MAY 16 1972
ANDY PAYNE
Clerk

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * * * * *

43,955 Kent Myer, resident taxpayer etc. v. City of Oklahoma City. Rehearing denied.

* * * * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ALMA F. ANDERSON, DIANA BARCLAY, BETTY JEAN B. NEILSEN and PARKER M. NIELSON,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiffs,	)	Civil No. C-10-71
v.	)	
SALT LAKE CITY CORPORATION and SALT LAKE COUNTY, UTAH,	)	
Defendants.	)	

The above entitled action came on regularly for trial without a jury before Honorable Willis W. Ritter, Chief Judge. The court having heard and considered the evidence and the statements and arguments of counsel, and being fully advised, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiffs are citizens, residents, and taxpayers of Salt Lake City Corporation and Salt Lake County, Utah.

2. Defendant Salt Lake City Corporation, a municipal corporation, and defendant Salt Lake County, a body corporate and politic, are political subdivisions of the State of Utah.

3. This action arises under the laws and Constitution of the United States, particularly the "establishment clause" of Amendments I and XIV, United States Constitution, and 42 U.S.C. § 1983. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

4. The defendants jointly own and maintain a building known as the Courts Building at 240 East Fourth South, Salt Lake City, Utah, in which are housed, among other things, the district courts of Salt Lake County and the Salt Lake City courts.

5. In July, 1970, at the request of a private organization known as the Fraternal Order of the Eagles, the defendants permitted to be erected on the premises of the Courts Building a granite monolith, approximately five feet high, three feet wide, and eight inches thick, set in concrete, and inscribed as follows:

the Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor's house.

Thou shalt not covet thy neighbor's wife, nor his manservant nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

6. In addition to the foregoing version of the Ten Commandments, or Decalogue, the monolith has a number of symbols, including the emblem of the Fraternal Order of the Eagles; an "All Seeing Eye of God"; Stars of David; and the Greek letters Chi Rho, signifying Christ.

7. The monolith was erected in furtherance of a nationwide program of the Fraternal Order of Eagles to have such monoliths placed on public properties. The program has been in effect in the State of Utah for approximately ten years, during which time nine such monoliths have been placed in various Utah cities.

8. Defendants have no general programs or ordinances establishing guidelines or procedures pursuant to which private persons may erect monuments or similar structures on public property.

9. The purpose of the Fraternal Order of the Eagles in erecting the monolith, and of the defendants in permitting its erection, was to advance religious ideas, particularly the Judaeo-Christian concepts of a Creator, monotheism, and the relationship of man to God and to Jesus Christ.

10. A primary effect of the erection of the monument on public property is to advance the ideas of the Judaeo-Christian religions and to inhibit the ideas of persons professing other religious beliefs or no religious belief.

11. By virtue of the location of the monolith near the front entrance of the Courts Building, people entering and leaving the building are led to believe that those administering the laws of Utah, Salt Lake County and Salt Lake City support the religious ideas expressed in the monolith.

12. Shortly after erection of the monolith, the plaintiffs formally requested the defendants to remove the monolith from public property, but the defendants rejected the request and instead of removing the monolith from public property installed a fixture to illuminate it at night; and unless enjoined by decree of this court, defendants will continue to maintain said monolith or monoliths of a similar nature upon public property.

CONCLUSIONS OF LAW

1. Plaintiffs have standing to bring this action.

2. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

3. Erection and maintenance of the monolith on public property violates the "establishment" clause of Amendments I and XIV, United States Constitution, and Article I, Sec. 4, Utah Constitution.

4. Defendants, under color of state statute, regulation, custom and usage have deprived plaintiffs of rights, privileges, and immunities secured by the laws and the Constitution of the United States.

5. Plaintiffs are entitled to a judgment directing defendants to forthwith remove the monolith from the premises of the Courts Building at 240 East Fourth South, Salt Lake City, Utah, and enjoining them from erecting, permitting erection of, or maintaining on public property any monument or monolith or structure of a like nature, or any monument, monolith or structure the purpose or primary effect of which is to advance or inhibit religion.

6. Plaintiffs are entitled to their costs.

Judgment is entered accordingly.

DATED this 3rd day of February, 1972.

/s/ Willis W. Ritter
CHIEF JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Filed in UNITED STATES
DISTRICT COURT
Disrict of Utah
FEB 3 1972
ANDREW JOHN BRENNAN
Clerk

ALMA F. ANDERSON, DIANA BARCLAY, BETTY JEAN B. NEILSEN and PARKER M. NIELSON,	)	JUDGMENT AND DECREE
Plaintiffs,	)	Civil No. C-10-71
v.	)	
SALT LAKE CITY CORPORATION and SALT LAKE COUNTY, UTAH,	)	
Defendants.	)	

The above entitled action came on regularly for hearing without a jury before Honorable Willis W. Ritter, Chief Judge. The court having heard and considered the evidence and statements and arguments of counsel, and having heretofore made its Findings of Fact and Conclusions of Law, it is

ORDERED, ADJUDGED and DECREED:

1. That defendants be and they hereby are ordered forthwith to remove from the premises of the Courts Building at 240 East Fourth South, Salt Lake City, Utah, the

granite monolith containing an inscription of, among other things, the Ten Commandments.

2. That defendants, their officers, agents, employees, and those acting under or in concert with them, be and they hereby are enjoined and restrained from erecting, permitting the erection of, or maintaining on public property any monument or monolith or structure of a like nature or any monument, monolith or structure a purpose or primary effect of which is to advance or inhibit religion.

3. Plaintiffs are entitled to their costs.

DATED this 3rd day of February, 1972.

/s/ Willis W. Ritter
Chief Judge
Willis W. Ritter

Chief United States District Judge
District of Utah
Salt Lake City, Utah 84101

FILE COPY

SEP 14 1972

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-260

KENT MEYER, a Resident Taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself and all other similarly situated taxpayers,

Petitioner,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, MAYOR JAMES H. NORICK and CITY MANAGER ROBERT H. OLDLAND,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROY H. SEMTNER
Municipal Counselor

TOM B. McGEE
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Counsel for Respondent

September, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. ----------

KENT MEYER, a Resident Taxpayer of Oklahoma City, Oklahoma County, State of Oklahoma, on behalf of himself and all other similarly situated taxpayers,

Petitioner,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, MAYOR JAMES H. NORICK and CITY MANAGER ROBERT H. OLDLAND,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma appears in Appendix A of petitioner's Petition for Writ of Certiorari and is reported in 496 P.2d 789 and therefore is not repeated herein.

JURISDICTION

This Court does not have jurisdiction since the petitioners did not present a Federal question in the trial court, nor in the Oklahoma Supreme Court, nor in their Petition for Writ of Certiorari to the Oklahoma Supreme Court. The judgment of the Oklahoma Supreme Court is on independent, non-federal grounds, sufficiently broad to sustain the decision.

QUESTIONS PRESENTED

1. Is the petition sufficient to invoke the jurisdiction of this Court by relying on 28 U.S.C. 1254(1) since the petition does not seek a writ directed to a Circuit Court of Appeal?

2. May the Supreme Court consider a Federal question which has not been raised at any stage in the proceedings, either in the courts below or in this Court?

3. Was the Petition for Writ of Certiorari timely filed?

4. Does the latin cross on the fairgrounds of The City of Oklahoma City violate any provision of the Constitution of the United States?

STATUTES INVOLVED

As conceded by petitioner in his petition before this Court there is no provision of the United States Constitution or Federal Statutory provision directly involved.

ARGUMENT

I.

THE PETITION IS NOT SUFFICIENT TO INVOKE THE JURISDICTION OF THIS COURT.

Petitioner's jurisdictional statement relies upon 28 U.S.C. 1254(1) to invoke jurisdiction. This statutory provision applies only to cases in the Circuit Courts of Appeals. The present case was finally decided in the Supreme Court of the State of Oklahoma. There is nothing pending in a

Circuit Court of Appeals which would affect this case. Petition cites no cases to sustain jurisdiction under the cited statute.

Rule 15 of this Court provides as follows:

"1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated—

* * * * * *

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

* * * * * *

(iii) The statutory provision believed to confer on this court jurisdiction of the appeal;

(iv) Cases believed to sustain the jurisdiction."

Rule 23 of this Court provides as follows:

"1. The petition for writ of certiorari shall contain in the order here indicated—

* * * * * *

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing

* * * * * *

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

* * * * * *

"4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

II.

THE SUPREME COURT OF THE UNITED STATES CANNOT CONSIDER A FEDERAL QUESTION WHICH HAS NOT BEEN RAISED AT ANY STAGE IN THE PROCEEDINGS, EITHER IN THE COURTS BELOW OR IN THIS COURT.

This case was litigated and decided entirely on the Oklahoma Constitution without any specific reference to any article or section of the United States Constitution. No Federal question was raised.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway*, 228 U.S. 326, 33 S.Ct. 510, 57 L.Ed. 857, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Cronwell v. Randell, 10 Pet. 368, 398, 9 L.ed 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed 535, Sup.Ct.Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed 847, 850, 22 Sup.Ct. Rep. 605."

Beck v. *Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, *Con. Law*, Section 115, states in part:

"... An appellant who fails to argue a constitutional contention in his brief, ... is considered to have abandoned or waived such contention. ..."

Southwestern Bell Telephone Company v. *State of Oklahoma*, 303 U.S. 206, 58 S.Ct. 528, 82 L.Ed.2d 751:

"2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commisssioners of Love County, Oklahoma*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751:

"A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

The Oklahoma Supreme Court decided this case on independent non-federal grounds which are sufficiently broad to sustain the decision.

III.

THE PETITION FOR CERTIORARI WAS NOT TIMELY FILED.

According to Appendix B of the petition herein, a petition for rehearing was denied by the Supreme Court of the State of Oklahoma and the denial was filed therein by the Clerk on May 16, 1972. The 90th day thereafter was Monday, August 14, 1972. The Petition for Writ of Certiorari was sent to the Supreme Court on Tuesday, August 15, 1972.

Meyer seeks this Court's jurisdiction under auspices of 28 U.S.C.A., Section 1254(1), but he did not send his petition to the Supreme Court for filing until 91 days after the decision sought to be reviewed was made final by the highest court of this State in which a decision could be had, i.e., the Supreme Court of the State of Oklahoma.

28 U.S.C.A., Section 2101(c), provides that the writ must be applied for within 90 days, however, for good cause may be extended for an additional 60 days.. No extension of time was asked for by Meyer. If 91 days had expired before the petition was sent, then even more time may have expired before the petition was received and filed in the Supreme Court.

IV.

THE LATIN CROSS ON THE FAIRGROUNDS OF THE CITY OF OKLAHOMA CITY DOES NOT VIOLATE ANY FEDERAL CONSTITUTIONAL PROVISION.

The guidelines for determining whether or not a law establishes a religion or prevents the full exercise of religious beliefs is stated by Mr. Justice Black in *Everson* v. *Board of Education of the Township of Ewing*, 330 U.S. 1-74, 91 L.Ed. 711, as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' Reynolds v. United States, supra, (98 US at 164, 25 L.ed 249)."

As emphasized above, Meyer is not being forced or even coerced to believe in Christianity by the presence of the cross. The cross does not support any religious activity or any religious institution. No money is being used to aid,

support or maintain any religion or any religious institution such as a church school or charity. By placing the lighted cross on the fairgrounds, the City of Oklahoma City is not participating in the affairs of any religious organization or sect.

In the *Everson* case, *supra*, this Court held that governmental funds could be expended to reimburse parents of children attending parochial schools for their transportation to and from such schools, as it did not establish a religion but was for the public welfare.

We submit that the Christmas season and its holidays are just as much if not more secular than Sunday. Sunday, which was originally set aside as a religious day of rest, is now a secular holiday. *McGowan* v. *State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393. Thus it could not be contended that the State or Federal Constitutions are being violated because school teachers are being paid by the taxpayers during the non-working days of the Christmas season or even on Thanksgiving Day. Also see *Zorach* v. *Clauson*, 343 U.S. 306, 72 S.Ct. 476, 96 L.Ed. 954, holding that public schools could "close its doors or suspend its operations as to those who wanted to repair to their religious sanctuary for worship or instruction"; i.e., close for religious holidays. That case also held that the New York City program, which permits students to be released from school to attend religious courses, was constitutional and did not coerce anyone to attend church or to observe a religious holiday or to take religious instructions even though there were students who were compelled to stay in school while others were excused to observe their religions.

There is no allegation that, upon request, the City of Oklahoma City has refused to place on the fairgrounds or on any other public property an insignia that might be classified as a non-Christian symbol. In *Murray* v. *Comptroller of the Treasury Maryland* (Md. 1966), 216 A.2d 897, certiorari recently denied by this Court, the Maryland Court in holding the following tax exemption statute constitutional:

> "'(4) Churches, parsonages, etc.—Houses and buildings used exclusively for public worship, and the furniture contained therein, and any parsonage used in connection therewith, and the grounds appurtenant to such houses, buildings and parsonages and necessary for the respective uses thereof.'"

said it did not deprive anyone of equal protection, since all houses of worship, including those that did not believe in a Supreme Being were exempt. Here, there is no showing of discrimination.

We also invite attention to *Protestants and Other Americans United for Separation of Church and State* v. *O'Brien* (D.C. 1967), 272 F.Supp. 712, holding the Christmas stamp picturing Memling's "Madonna and Child with Angels" constitutional.

We would also note that in *Fowler* v. *State of Rhode Island* (1953), 345 U.S. 67, this Court held that public property could be used for church services.

Even in the case of *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, wherein the reading of the Bible each day in public school was held unconstitutional, the Court said that the Bible

could be taught in public schools from a secular viewpoint and such was concluded in *Calvary Bible Presbyterian Church of Seattle* v. *Board of Regents of the University of Washington* (1967), 436 P.2d 189.

Clearly the Bible is a religious symbol and, yes, more than a symbol; it contains religious teachings. Now, if the Bible can be taught in the public schools as outlined by the courts, then the fairgrounds cross can be used as an expression of goodwill.

We also submit that it is not unconstitutional for the Federal Government to spend public funds to print on the dollar bill "In God We Trust" or to place on treasury notes and Federal Buildings of the United States the Great Seal. Such seal contains a religious symbol above the pyramid; *i.e.*, the All-Seeing Eye of God. Please see *Rector, Etc., of Holy Trinity Church* (1892), 121 S.Ct. 511.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROY H. SEMTNER
Municipal Counselor

TOM B. McGEE
Assistant Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Counsel for Respondent

September, 1972